IN THE

# Supreme Court of the United States

OCTOBER TERM, 1934.

No. 717.

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LOUISVILLE JOINT STOCK LAND BANK,

*Petitioner,*

vs.

WILLIAM W. RADFORD, SENIOR

*Respondent.*

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## SECOND ADDITIONAL BRIEF FOR RESPONDENT.

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### Statement.

In the first additional brief for respondent, an attempt was made to answer the brief for petitioner served on March 28, 1935. That task had not been finished when the time allowed for the preparation of that brief had expired. Further time having been given, the work thus interrupted is resumed.

## BRIEF.

### FIFTH AMENDMENT.

Counsel for the respondent, who is filing this brief, concede the operative force and effect of the Fifth Amendment, as construed by this Court and as applicable to the rights of the parties to this proceeding.

Counsel for petitioner entirely misapprehend the application of the Fifth Amendment to the proceeding before the Court.

The Fifth Amendment is not a missile to be thrown broadside into a legal structure in the hope of thereby demolishing it, nor is it a barrage with which to shell the terrain of pending litigation.

A person cannot avail himself of the Fifth Amendment which

(a) forbids that such person shall not be deprived of his property without due process of law, by

(b) claiming that at some future date, or in some circumstances not at issue in the proceeding at bar, such deprivation may take place as to some other person (262 U. S. 488).

In considering the application of the Fifth Amendment to a particular Act of Congress, it must be remembered the Court deals with what has been done in the instant case, not what may be done in some other case.

> "The criterion (in passing on an act challenged as invalid under the Fourteenth Amendment) is not the possibility of conceivable injury * * *" (219 U. S. 67).
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> "Only such persons who are in some way prejudiced by an unconstitutional law can complain of it" (232 Mo. 65).
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> "One who is not prejudiced by the enforcement of an Act of the Legislature cannot question [redacted] consti-

tutionality, or obtain a decision as to its invalidity on the ground that it impairs the rights of others" (6 Ruling Case Law, pp. 89, 90; see 87).

The due process clause does not impose an unobtainable standard of accuracy (234 U. S. 385, 395). One who would strike down a statute as unconstitutional must show "that the alleged unconstitutional feature injures him" (259 U. S. 123).

See also 71 Fed. (2d) 482.

What has happened to the Bank in this case up to date: Radford was granted the right to remain in possession of mortgaged property for five years by paying a reasonable annual rental fixed by the Court at a hearing at which the mortgagee was present and offered no evidence, though it had an opportunity to do so.

Only that, and nothing more.

Such action cannot be held unconstitutional (290 U. S. 388).

Tested by the foregoing, the claim of lienholder that because it may be allowed a general claim for the unsecured value of his debt, and thus decrease dividends to other creditors (Brief, p. 19), the Act is void, is not tenable.

## THE FUNDAMENTAL LAW.

Counsel for the lienholder (Pet. Brief, p. 25), state: "It has always been the fundamental law of this country that a mortgagee had the right to receive the full proceeds (up to the amount of his debt), at a public sale of the property." The Constitution is generally regarded as the "fundamental law" of our country.

Mr. Justice Story defined a constitution as "a fundamental law or basis of government * * *" (12 Corpus Juris, p. 675, Sec. 1).

A "constitution is * * * the fundamental law of the land * * *" (39 South. 893).

"A 'constitution' is the written instrument by which the fundamental powers of the government are established * * *" (1 Words and Phrases (2d Ed.), p. 922).

Bouvier's Law Dictionary (Rawle's 3d Revision) defines a constitution as "the fundamental law of a state * * *"

"The fundamental law of a free country * * *" (3 Barb. (N. Y.) 198).

See also 2 Words & Phrases (1st Ed.), p. 1462, right hand column.

And wherein does the Federal Constitution, except in a proceeding in bankruptcy and as an incident thereof, govern the foreclosure of mortgages?

Do counsel by the fundamental law "mean the fundamental law of mortgages?" As of what date is this law to be ascertained? (Consult Deut. 15 I; Lev. 25.)

Do counsel mean a return to the "fundamental law" of mortgages under which there was no foreclosure, no redemption, no hope for the mortgagor, but only a present sale of the property, subject to a defeasance in case the debt was paid on the law day?

But Congress under the power to establish a uniform law on the subject of bankruptcies may displace a theretofore existing fundamental law. Otherwise, Hanover National Bank v. Moyses, 186 U. S. 186, would have been otherwise decided.

As to Workmen's Compensation Laws this Court has ruled: "* * * such statutes are not open to constitutional objection because they abrogate common law defenses * * *" (263 U. S. 422). See also 250 U. S. 423, 424.

"Novelty is not a constitutional objection * * *" (250 U. S. 419).

As to the article of Mr. Wehle, cited by the counsel for the lienholder (Pet. Brief, p. 25), the writer recognizes

that Section 77B implies a new theory of bankruptcy law. He says, *inter alia*: "* * * under it old rights can be destroyed and new ones created." The author admits:

> "With the advent of the multiple-bond mortgage upon great railroad property, it became difficult to maintain the unitary mortgagee's ancient alternative right to either cash proceeds of a fair sale or to the property itself."

Here is a frank confession that the alleged "ancient alternative right" of a unitary mortgagee, "to either cash proceeds of a fair sale or to the property itself," is not a constitutional guarantee.

A perusal of Mr. Weahle's article will disclose that the author is not condemning the theory of 77 B, but is showing a way in which the section can be made more efficient.

The whole proposition in the case at bar comes to this:

(a) Prior to enactment of National Bankruptcy Act, July 1, 1898, a mortgage holder in Kentucky, on bidding two-thirds of the appraised value of the property, was entitled to have the sale confirmed and a deed issued to him without redemption on the part of the mortgagor. This left the mortgagor indebted to the mortgagee, by way of a deficiency judgment, for one-third of the mortgage debt. The payment of this balance could be enforced against any non-exempt unencumbered property of the debtor. If not so paid, this deficiency judgment could be renewed, the interest compounding so long as the debtor was alive.

(b) On July 1, 1898, President McKinley approved National Bankruptcy Law. This law left the situation, hereinbefore outlined, unchanged with this exception: The debtor was entitled to apply for a discharge from

his debts. The validity of the Act of 1898 has been upheld (186 U. S. 186). This left the debtor in that situation described by counsel for the lienholder: Freed from his debts and also freed from his property, the debtor started again in the battle for existence, unencumbered by any belongings and unharrassed by any creditors.

(c) Subdivision (b) hereinbefore named was a great advance over subdivision (a), and was not achieved without a struggle.

(d) By the act approved June 28, 1934, the right of the creditor to a sale of the mortgaged property was postponed. It is true that the act fixes the period of postponement at five years. But under the doctrine of the Minnesota Mortgage Moratorium case (290 U. S. 398) the fact that the period is so fixed is immaterial. The Court will enforce the moratorium so long as the Court deems it reasonable and not arbitrary to do so. When the Court reaches the conclusion that its continued enforcement would be so unreasonable as to make it a deprivation of property without due process of law, the Court will decline to enforce the moratorium and it would be at an end.

(e) While the moratorium is in effect, the debtor pays a rental, the result of a judicial decree, at the hearing of which the lienholder had an opportunity to present evidence of such rental value. In the case at bar, the district court fixed this rental for one year, giving to the lienholder the right to have this rental increased if future circumstances warranted.

(f) In case the debtor buys the property at the higher of two valuations, and the property thereafter increases

in value, then the debtor enjoys this increase. Per contra, if there had been no Frazier-Lemke Act, and lienholder had become the owner of the property, under the law as it existed before the Frazier-Lemke Act was enacted, and the property had thereafter increase in value, then the lienholder would have enjoyed the benefit of such increase.

So that, reduced to its last analysis, the whole controversy seems to be in the nature of a battle with windmills that are not really revolving at all. A great battle is in progress over the question, who shall ultimately enjoy the benefit of an increase in value which may never be realized and whether or not Radford may ever be able to accomplish a task now impossible, that of accumulating enough money to repurchase his farm.

Stated in another way, Radford will be exceedingly fortunate if, for a period of five years he succeeds in paying the rental for the farm as annually fixed by the Court. Assuming that he is successful in doing so (it must be remembered that when he fails to pay the rent, his privilege to purchase is at an end), how is he ever going to buy the farm? Under the Act, he cannot buy the farm except by paying the higher of two valuations. In normal times, he may be able to borrow seventy-five per cent of that valuation. But how is he going to save twenty-five per cent, or at the annual rate of five per cent, of the valuation of the farm, in the present state of affairs.

Let us engage in mathematics for a moment. The Court fixed the annual rental value of the land at $325. We may assume that this fairly represents the productive value of the land. To pay $4,445 for the land in five years (assuming that the value of the land has not increased), Radford would have to borrow at least $3,335. This leaves $1,110 which Radford has to get out of the

land in five years or over $200 a year. In other words, for the Frazier-Lemke Act to be of any practical value to Radford, he must in some occult way, get $525 a year income out of land, the reasonable annual rental value of which has been fixed at $325. If he succeeded in accomplishing this herculean task, he would still have to accomplish that which now is practically impossible, borrow $3,335.

So far as the privilege given by the Act to Radford, to buy the land is concerned, this privilege is of no practical value whatever and is not even worth discussing. Radford has not bought his land. He has no money with which to buy the land. It is not likely that he ever will have this money. Even if he ever did save $200 a year and thus accumulate in five years one-fourth of the value of the land, he would still have to borrow the remaining three-fourths. It is impossible at the present writing, for a farmer to borrow any money except through a governmental agency. There is no certainty that the government will continue to loan money to farmers.

Radford's only hope is that the Court in this case will sustain the principle of the Frazier-Lemke Act. He hopes as an individual insolvent debtor, with the co-operation of the Court, to adjust his outstanding indebtedness. He hopes that this adjustment may bear a due relation to the value of his assets. He also hopes that the law may be amended so that in some way not yet discovered, he may be able to pay the amount of his debt as thus adjusted. Corporations have done this for many years under the sheltering arms of a court of equity and lately under Section 77B of National Bankruptcy Act. Corporations on terms thought to be reasonable, through the appointment of friendly receivers, have remained in practical possession of their assets without paying anything

at all, rental or otherwise. This possession has endured for an indefinite period. Radford does not, under the Frazier-Lemke Act enjoy that which Courts have freely accorded to corporations. Radford pays rent while he is in possession of his farm or he is dispossessed. A corporation does not pay rent or anything else while in the hands of a receiver. Radford is limited to a period of five years in which to repurchase his farm. Corporations have an unlimited period of time in which, under an altered name, to repurchase their property. Radford must pay a valuation fixed by the Court, which is expected to be the full value of the land, and that in cash. Corporations purchase their assets by issuing stocks, bonds and other securities, which may or may not have any value. As a step in this process, corporations make a bid for their assets, which is purely nominal and bears no real relation to the value of the assets. For example, some years ago, the assets of the St. Louis and San Francisco Railway Company were sold for $45,000,000. With the approval of the Court, a public service commission and the Interstate Commerce Commission, securities were issued based on the assets thus acquired, for over seven times the amount of the bid, $315,000,000.

THE FARMERS OF THIS COUNTRY ASK ONLY THAT WHICH CORPORATIONS HAVE LONG ENJOYED.

Underneath the surface, the real objection to the Frazier-Lemke Act is not to the language of the Act, not to what Radford may enjoy by reason of this proceeding, not to what may happen in other cases, but an exhibition of that selfishness which has attempted to act as a brake upon the wheels of progress in every advancing step in the jurisprudence of the world. Corporations have objected to the decision in Munn v. Illinois, the

right of a state to regulate elevator charges. In the Granger cases, they objected to the regulation of railroad rates. Corporations protested loud and long against the anti-trust act. Corporations criticized the decision of this Court in giving to a state the right to regulate the terms of a policy of insurance issued in that state. Corporations denounced the decision of this court in the Minnesota Mortgage Moratorium case.

*Corporations claim the Frazier-Lemke Act is unconstitutional (it relates to farmers), and at the same time hail Section 77B as their deliverer in time of trouble.*

The reason for the foregoing is the same reason that prompted Adam and Eve to complain of the rules and regulations of the Garden of Eden, which prompted Jonah in declining to go to Nineveh, which caused the troubles of Moses, and has been characteristic of the human race: a belief that man is an isolated atomic fragment, automotive, self-contained, sufficient unto himself alone, regardless of the world of which he is a part, and seeking only that which he claims to be his own, having no thought of the welfare of another, and chafing under every form of law and order. In short, a belief in self, a selfishness which is the basis of all the troubles from which the world is now suffering.

Counsel claim that at one time, "the very essence of a mortgage was the right of the mortgagee to have the property devoted to the satisfaction of his debt" (Pet. Brief, p. 25).

Under the Frazier-Lemke Act, the property, that is the value thereof, is so devoted. The creditor is not allowed to use a worthless debt in bidding on the property and thereby preventing a farmer owner from regaining his property.

Again (Pet. Brief, p. 25): "Until the passage of the Frazier-Lemke Act, no court or legislative body had ever provided that the debtor might

(a) "Keep the property for himself,

(b) "While forcing the mortgagee to accept an amount less than his debt,

(c) "an amount not determined by a sale of the property at which the general public,

(d) "including the mortgagee

"had the opportunity to bid";

the following is submitted:

> "Novelty is not a constitutional objection . . . ."
> (250 U. S. 419).

As to (a): A farmer does not keep the property for himself. Upon the adjudication in bankruptcy, the title to the farm passes to the trustee in bankruptcy. The farmer no longer has a farm to keep. True he is given the privilege of buying a farm once owned by him. The exercise of this privilege is dependent upon paying the reasonable value of the farm.

As to (b): A farmer does not force the mortgagee to accept an amount less than his debts. The farmer in buying the farm pays the reasonable value of the farm. If that value is less than the amount of the debt, such a result is not the fault of the farmer. If the unpaid portion of the debt is discharged in bankruptcy without the payment of any dividends thereon or with the payment of a dividend not discharging the debt in full, such a result is not the fault of the farmer.

As to (c): The general public may attend at a hearing under the Frazier-Lemke Act and may bid on the property. Such a bid if made is evidence of the value of the property. True, as Mr. Justice Brandeis observed at the argument, a person who cannot become the successful bidder is not likely to bid at all. But a lienholder may

subpoena a possible bidder as a witness and have him testify as to what he would have bid if he could have bought the property. This testimony might become evidence of the value of the property.

As to (d): The mortgagee complains loudly that it, the mortgagee, cannot attend the sale and bid the amount of its debt for the security. Nothing prevents the mortgagee from attending the sale. The sale if ever made, is made by an order of Court. The order cannot be entered except on notice to the mortgagee. He has the right to be present when the order is entered. As to the mortgagee bidding on the property and using a bit of paper, that is worthless as to the difference between the value of the property, plus a possible dividend out of the unencumbered non-exempt assets of the debtor and the face of the note, this is the whole crux of the situation.

Before the Frazier-Lemke Act, a mortgagee could bid the amount of his debt, without regard to the value of the security. In this way thousands of farmers were being dispossessed of their farms without hope of redemption.

To remedy the foregoing state of affairs, Congress on the theory that equity regards that as done which ought to have been done, treated as worthless that portion of the debt held by the mortgagee and for which there was no security and on which no payment could be made out of the general assets of the debtor. This put the mortgagee and the mortgagor on an equality when it came to purchasing the farm from the trustee in bankruptcy.

At that stage in the proceeding the farm did not belong to the mortgagee. The only interest that the mortgagee had in the farm was the value thereof. That portion of the debt held by the mortgagee, not represented by the value of the farm and on which no dividend was payable out of the general assets, was a mere scrap of paper, without form and void.

At that stage in the proceeding, the farm did not belong to the mortgagor. The only interest he had in the farm was in the nature of an exemption granted to him by law, the right to purchase the farm for cash at a reasonable value as the result of a judicial decree, at the entry of which the mortgagee had the right to appear, introduce evidence and be heard by counsel.

Such a result is so just and equitable as to merit the approval and not receive the denunciation of the Court.

Counsel for the petitioner (Pet. Brief, p. 26) referred to what is called a "fundamental principle" and claim that upon this principle "was built up the whole system of credit, by which debtors were enabled to borrow money by mortgaging property to the lender."

As to the system of credit to which counsel refer, that system had broken down prior to the enactment of the Frazier-Lemke Act. Radford had borrowed money of Louisville Joint Stock Land Bank. He was not able to pay the interest on the mortgage and the taxes on the land. The system of credit to which counsel refer instead of coming to his aid and in some manner refinancing his debt proceeded to foreclose his mortgage. In those circumstances, Congress reached the conclusion that the preservation of the home of the farmer was more important than the resurrection of a broken down system of credit. In so doing, Congress put the man over the dollar, human welfare over a defunct system of credit.

The intimation of counsel for the petitioner (Pet. Brief, p. 26) that under the Frazier-Lemke Act, "a debtor could borrow money, pledge property to secure payment thereof, and yet upon default retain the property for himself and prevent the lender from having the thing pledged devoted to the payment of the debt" is inaccurate.

Radford does not retain the pledged property for himself except upon payment of the reasonable value thereof.

By the same token, the lender is not prevented from having the thing pledged devoted to the payment of the debt. The lender receives the proceeds of the sale of the thing pledged, just as creditors usually in bankruptcy proceedings receive dividends out of the sale of assets generally.

Counsel for petitioner (Pet. Brief 26) seize upon the term "fundamental law" as used in Hanover National Bank v. Moyses. The fundamental law in the case cited is a law which proceeds upon inquiry and hears before it condemns. The Court in the case cited was discussing the question of the right of a debtor to be granted a discharge from the obligation to pay his debts and the sufficiency of the notice given to creditors of the hearing upon such application. The Court in the case cited did decide that a debtor might be discharged from the payment of his debt and yet, against the consent of the creditor, be allowed to keep his exempt property without paying anything for it unless it was encumbered.

Until the passage of the law construed in the Moyses case, a debtor was not entitled to a discharge from a prior obligation. The law upheld in the Moyses case changed that rule. By a parity of reasoning, the law which we hope will be upheld in this case, likewise changes the law on the subject of bankruptcy.

Under the Frazier-Lemke Act the creditor is still entitled to have the thing pledged devoted to his debt. The creditor receives the proceeds of the sale of the thing pledged. The debtor does not retain the title to the thing pledged. That title passes to the trustee in bankruptcy. The trustee sells the property to the debtor and applies the proceeds towards the payment of the creditor's claim.

Counsel for the petitioner claim that an act of Congress is unconstitutional because it is claimed to be "repugnant to the deep-rooted principles of American law relating to the right of a mortgagee". We are not ad-

vised as to the place in the Constitution where those deep-rooted principles may be found. For example, prior to July 1, 1898, it was a deep-rooted principle of the law of preferential transactions that a creditor of an insolvent debtor who actually knew of such insolvency might accept and retain a preferential transfer of the assets of his debtor, if, the transfer was otherwise in good faith and not fraudulent. After July 1, 1898, such "deep-rooted principles" were uprooted in the circumstances specified in Section 67-E, National Bankruptcy Act.

As to giving to B the property of A (Pet. Brief, p. 29), the Frazier-Lemke Act does not give to the debtor anything that belongs to the creditor. True, if a debtor repurchases his farm and thereafter the farm increases in value, the debtor enjoys such increase. On the other hand, if the debtor repurchases his farm and the farm thereafter decreases in value, the loss falls on the debtor.

## SCALING DOWN DEBTS.

As to "scaling down" debts: Louisville Joint Stock Land Bank, under date of October 22, 1933, offered to purchase one-half of its outstanding indebtedness at 55, plus accrued interest.

John G. Hibbard, Secretary of the Association of Joint Stock Land Banks, issued a statement at Rochester, N. Y., on April 6, 1935, to the effect that 44 Joint Stock Land Banks bought and cancelled in 1934, $89,000,000 of their bonds at an average discount of less than 25 per cent.

One of the purposes of the bankruptcy act is to leave the honest debtor free from liability upon previous obligations.

Central Trust Co. v. Chicago Auditorium Assn., 240 U. S. 581, 591;

Williams v. U. S. Fidelity Co., 236 U. S. 549, 554;

Local Loan Co. v. Hunt, 292 U. S. 234.

## VALUE OF RADFORD'S FARM.

Counsel for the petitioner complain (Brief, p. 31) that the value of $4,445 placed on Radford's farm by the referee in bankruptcy, approved by the District Court and affirmed by the Circuit Court of Appeals, is not equivalent to the present market value (Brief, p. 31).

The present market value of Radford's farm is a question of fact which has been passed on by a referee in bankruptcy, a District Court and a Circuit Court of Appeals. Ordinarily questions of fact thus decided are not reviewable in this Court.

> "The verdict of the jury approved as it was by the trial and appellate courts, settles the disputed questions of fact" (211 U. S. 611).
>
> See, also, 254 U. S. 600.

Let us face the situation: Through circumstances beyond Radford's control, a farm once worth $18,000 has become reduced in value to $4,445. Suppose the Bank should buy this farm for its accrued debt with interest, estimated at a date not specified in the brief of petitioner, to be $9,205.05 (p. 30). Suppose the farm thereafter became worth in excess of the amount just stated. Has the Bank a constitutional right to this speculative unrealized imaginary enhancement? Why should Radford, because of such speculative theories, be deprived of the opportunity of benefitting by a rise in the present fair and reasonable value of his farm?

In estimating the value of land, speculative possibilities are not considered.

The statement by counsel (Brief, p. 32): "the test of market value is what somebody is willing to pay for the property" is not accurate. Market value is that value which a purchaser desirous but not compelled to buy is

willing to pay and a seller desirous but no compelled to sell is willing to take.

Consult:

5 Words & Phrases (1st Ed.), pp. 4583, *et seq.*;
3 Words & Phrases (2nd Ed.), pp. 300, 303, *et seq.*

Counsel claim that if Radford had given the Bank a deed to the farm and it had cancelled the debt against Radford, or if the referee had permitted the Bank to purchase Radford's farm from the trustee in bankruptcy and pay for it by cancelling his debt, the Bank would have been paying more than $4,445 for the farm. Hence it is argued that the market value of the farm is more than the amount stated. This alleged discrepancy is sought to be worked out in this way:

If Radford pays the Bank $4,445 for the farm (and even in the absence of such payment), the Bank has a general claim against Radford for the difference between $4,445 and the amount of its debt with interest as it existed at the date of the filing of the petition herein. The value of this claim depends on the dividend that may be declared thereon. Radford has some unencumbered non-exempt personal property. He also has some encumbered non-exempt personal property. Nobody can tell from the record in this case how much this latter class of property may realize for the general creditors, nor how much the Land Bank would have lost in cancelling its general claim against Radford, because no one knows how much dividends it may receive thereon. Hence there is no tangible basis for the claim that $4,445 is not equivalent to the present market value of the farm.

## RISK OF DECLINE.

Complaint is made, a creditor takes the risk of decline in the value of the security during the moratorium period

(Brief, p. 37). At one time, the bank was willing to take this risk, by asking Radford for a deed to the property, and by offering to buy the property for its debt. In either case, the creditor would have taken the risk of decline. Creditor took the risk of decline when it made its loans. Before bankruptcy, Radford took the risk of decline. His original equity of $9,000 in the farm is completely lost. But as pointed out in First Additional Brief for Respondent (blue cover), pp. 22, *et seq.*, Radford is required to agree to the purchase of the farm. Hence Radford takes the risk of decline, while the Bank, by a reappraisal, may get all the benefit of an increase.

> "Damages which are uncertain, contingent, or speculative in their nature cannot be made the basis of a recovery" (17 Corpus Juris, p. 753, sec. 3; 191 U. S. 112; 49 Kan. 17).

But:

(a) Instead of increasing in value, if Radford bought at $4,445, the farm might decrease in value; hence Radford would lose.

(b) The bank might sell Radford's farm for less than $4,445, or at a price that did not reflect the subsequently enhanced value, if any, of the farm. In that event, the bank would sustain a loss.

## THE REAPPRAISAL PROVISION.

Counsel for the Land Bank claim that the reappraisal provision of the Frazier-Lemke Act does not safeguard to the Land Bank the right to benefit from any enhanced value of the mortgaged property (Brief, p. 32).

In support of this statement, counsel invade the realm of the imagination. The value of the land may increase (it may decrease); the increase may reach a peak (no one may tell when that will happen); Radford may fail to

discover that the value of the land has reached its peak (he is not omniscient); Radford may not be able to buy the farm when it has reached its peak (he is not made of money) Radford not buying the land at its peak, it may decrease in value and the Bank may lose the peak value. So runs the argument of the counsel for the petitioner, *ad libitum* and *ad infinitum*.

But suppose the Frazier-Lemke Act had not been enacted, suppose the Bank bought the farm at a foreclosure sale, suppose the Bank sold the land before the peak had been reached, suppose the Bank allowed the peak to go by and sold the land on a falling market? Who would make good to the Bank the loss thus sustained?

## PUBLIC SALE.

The lienholder may not complain if it be deprived of a public sale of Radford's farm.

In the absence of a statute or a provision in a mortgage to the contrary, a mortgage may be foreclosed at private sale.

> 3 Jones on Mortgages (8 Ed.), p. 926, Sec. 2404.

As to the alleged constitutional right of a mortgagee to a public sale of the security:

> "Where not restricted by statute, the Court may in the exercise of its discretion, order either a private or public sale as the best interests of the parties require."
>
> 35 Corpus Juris, p. 34, Sec. 44.

In bankruptcy, "private sales both of real and personal property may be made in such manner as the Court may direct."

> 6 Remington on Bankruptcy, 3d Ed., Sec. 2541;
> 11 United States Code, Annotated, Sec. 10, p. 528, note 733.

Indeed, foreclosure sales in Federal Courts may now be conducted as private sales.

48 St. L., p. 1119.

What is the purpose of a public sale? That purpose is the protection of the mortgagor, to insure competition at the sale and to increase the price bid by possibly increasing the number of bidders.

Who would attend a public sale if one were accorded the mortgagee, and become a bidder in the present economic conditions of the country? Only the mortgagee.

If the mortgagee could bid at a private sale, is there any reason why the mortgagee could not thereafter for its own benefit conduct a public auction and sell the farm to the highest bidder? None.

Why should the mortgagee complain of the elimination of a public sale in the foreclosure of a mortgage? Here is the answer:

The lienholder is not so much concerned in the question, is the sale of Radford's property to be public or private, as it is in having a sale of some kind take place which may result in the dispossession of Radford and his ownership of the farm.

Whence did the practice of selling mortgaged property in public originate? Certainly not in the consciousness of a mortgagee. Centuries ago, mortgagees as an incident of a loan, exacted an instrument which executed itself. The title *ipso facto* became complete in the mortgagee if the debt was not paid as and when so agreed. A chancellor discovered the equity of redemption. As a corollary, the chancellor granted to a mortgagee the right to foreclose the equity of redemption. Then, in the give and take of the law, the balancing of remedies, the Court, for the protection of the mortgagor, required the sale to be public.

What constitutional right of a mortgagee is invaded by a private sale at which he may bid?

The real complaint of the mortgagor is not the absence of a public sale; it is the absence of a sale, public or private, by which it may exchange a worthless piece of paper in payment of an equity which in turn has no present value.

## OPTION TO PURCHASE.

As to the statement: "The mortgaged property was sold to Radford for less than half that which the Land Bank offered to pay for it in cash" (Pet. Brief, p. 19), here we have an admission that the mortgaged property was actually sold to Radford, not merely that Radford was given an option to purchase it.

Counsel for the petitioner complain of the terms of purchase granted a debtor by the Frazier-Lemke Act (Brief, p. 41).

Debtor does not, as shown herein, obtain an option to purchase the farm. Debtor is required to agree to buy the farm in question.

The farm is not sold for the "appraised" value. The appraisal is but a step in a judicial ascertainment of the value of the farm. Such ascertainment was made in the case at bar.

The repurchase of the farm does not of itself "discharge the mortgage debt." Debtor, upon such repurchase, is granted the right "to apply" for his discharge.

Debtor cannot "throw the property back on the hands of the mortgagees or the Court." Debtor has agreed to purchase the farm. Here again is a bundle of errors (Pet. Brief, p. 41):

"The mortgagee is compelled:

(a) "to permit the farmer to buy back the property at an appraised value;

(b) "not necessarily the market value;

(c) "and be released from his indebtedness;

(d) "even though the mortgagee

(e) "or the general public would bid much more than the appraised or reappraised value of the property."

As to a mortgagee being compelled to permit a farmer to repurchase his farm: Centuries ago lienholders were required to permit debtors to redeem from a foreclosure in the face of a mortgage to the contrary. The farmer does not repurchase his farm at an "appraised value," as that term is generally understood. The farmer buys his farm, if at all, at a value judicially ascertained, upon the hearing of evidence.

(b) In the proceeding at bar, the "reasonable value" and the "market value" are identical.

(c) The farmer is not released from his indebtedness by repurchasing his farm. That release comes, if at all, by reason of the general bankruptcy law (186 U. S. 186).

(d) The mortgagee did not bid more than the appraised value of the property. That portion of its debt in excess of the appraised value is worthless.

(e) The general public did not bid on Radford's property, nor is there any evidence of what the general public would have bid if it had had an opportunity to do so.

## SALE FREE OF LIEN.

The fact that courts have regarded as discretionary the power to sell property free of lien and to transfer the

lien to the proceeds (as contended by counsel for lienholder), does not make such rule a doctrine of constitutional law, nor prevent Congress from authorizing such sale to be made in all cases if it so deems wise. Prior to the enactment of the Frazier-Lemke Act, a court in selling encumbered property, in case of an admittedly valid lien thereon, was only concerned with the value of the equity of redemption. Under the Frazier-Lemke Act, the Court is concerned with the reacquisition by a farmer of the title to his farm free and clear of lien.

As to authorizing a sale of property "at a price less than that which the creditor himself offered to pay in cash for the property" (Pet. Brief, p. 18), here again the reference to cash is "as baseless as the fabric of a vision". A payment of cash to a trustee by a lienholder to be immediately returned to the lienholder is simply converting a court of bankruptcy into a clearance station for despoiling an individual of his habitation. Certainly, a lienholder does not possess a constitutional right to such a result.

As to the bank offering to pay for the land "in cash" by issuing a check, the proceeds of which, less court costs, would have been immediately returned to the lienholder, such a result, if allowable (which debtor denies), would deprive a farmer of the provisions of a beneficient act designed to promote the general welfare and to nullify such legislation.

In determining the market value of property, the value which the owner places on it cannot be considered (20 Corpus Juris, p. 728, Sec. 187; see also, 36 L. R. A. N. S. 162). So what the land bank itself offered for the property is immaterial.

In cases arising under the power of eminent domain, the rule is thus stated:

> "The mortgagee of the land condemned is entitled to the amount of the mortgage and interest if the

value of the land exceeds the amount of the mortgage" (not so in the case at bar).

"And to the value of the land less the proper apportionment of taxes and assessment if the value of the land is less than the face of the mortgage."

20 Corpus Juris, p. 740, sec. 193;
*In re* Public Park, 172 N. Y. Supp. 50, 51, 52.

As to the power of sale vested in the bankruptcy court:
Robertson v. Howard, 229 U. S. 254, 263.

## COMPOSITIONS.

Lienholder admits that by the machinery of composition, with the approval of the court, majority creditors may "bind the dissenting minorities" (Pet. Brief, pp. 19, 20).

But it is not the majority which *per se* has the right to bind a dissentient minority. The approval of a court is a *sine qua non* to the validity of a composition (Sec. 12d). The consent of the majority is certainly not a constitutional requisite to such approval. Such consent is merely evidential of the fairness of the composition.

To intimate (Pet. Brief, p. 19), that "corporation reorganizations under Sections 74 and 77 • • • are merely a form of composition" is a vain effort of counsel to uphold for others that which is attempted to be denied to farmers.

It is asserted that "compositions have never affected a secured claim held in full by a single creditor" (Pet. Brief, p. 21). This statement may be admitted, but what of it? Congress in the enactment of legislation is not limited to the re-enactment of legislation already in existence. The act of legislation is progressive in its nature and the validity of an act is not affected by its novelty

(250 U. S. 419). This is recognized by Judge Chesnut (7 Fed. Supp. 674); Judge Simons (74 Fed. 2d, 579); Judge Sparks (70 Fed. 2d, 932); and by Judge Parker in the case decided by the Fourth Circuit Court of Appeals, April 2, 1935.

The power of Congress to alter the established state of the law, will be further discussed under the heading, *post*, The Fundamental Law.

Suppose a debtor executed twelve separate mortgages, each to a separate creditor, upon an undivided one-twelfth interest in a farm. Suppose a majority of such creditors, in number and amount, agreed to a composition of fifty cents on the dollar. According to counsel for petitioner, the majority could bind a minority because *a class theory could thereby come into play* (Pet. Brief, p. 21).

Does a constitutional form of government, ordained by the people to promote the general welfare, include within its constitutional protection, "a class theory"?

Congress may recognize a class theory, if deemed expedient, but the Constitution does not make imperative such recognition.

Suppose, on the other hand, that a debtor executed one mortgage on one tract of land to secure twelve different bonds, held by twelve different people. In this case, compulsory composition is admittedly constitutional.

Suppose a debtor executes one mortgage on one tract of land to secure one bond, why may not Congress make a composition compulsory as to one creditor?

Whatever else may be said of a composition, the fact remains:

(a) Compositions in proceedings in bankruptcy are only valid to the extent authorized by law and as may be approved by the Court.

National Bankruptcy Law, sec. 12.

Hence, the statutory validity of a composition depends upon the nature and extent of the power of Congress to establish a uniform law on the subject of bankruptcy. If Congress may permit one creditor to be bound, because of an evidential fact, that is, two creditors believe that such result is just and equitable, and the court agrees with them; certainly Congress can establish such evidential fact by legislation, uniform in its operation, subject of course, to the power of the court to decline to enforce that law if deemed unreasonable.

What is the theory of a composition consented to by a majority of the creditors and dissented from by a minority? The theory is that it is to the interest of the creditors as a whole, that the composition be confirmed. Congress has recognized that it is to the interest of creditors as a whole that the wholesale foreclosure of mortgages should cease, that the value of farm lands shall be stabilized, and to that end, mortgages should be foreclosed, if at all, "decently and in order".

We are told by counsel for a lienholder which is seeking to foreclose a mortgage on a farm, asking that its debt be paid in full, all in utter disregard of the effect of such action upon the debtor and his other creditors, that "compositions are based upon (1) the general principle of equality and reciprocity among the creditors, and (2) the democratic principle that a majority of a class similarly situated shall control".

It is difficult to discern any theory of "equality and reciprocity among the creditors" in the effort of the lienholder to acquire for itself alone without a resultant benefit to anyone else, the farm of a debtor.

As to the democratic principle of a control by the majority of a class, Congress has given expression to this principle by protecting a majority of the class known as creditors, from:

(a) An improvident and wholesale foreclosure of securities, thus depreciating the value thereof as a class;

(b) An undue inflation of the currency, which might result from issuing sufficient currency to enable all debtors to pay their debts in full and thereby depreciate the value of such currency; and

(c) Unduly raising the price level of agricultural commodities so high as to make it impossible for the creditors of farmers to buy the necessities of life, except at greatly increased prices, thus depreciating the value of the income of such creditors.

To particularize:

(a) Prevailing agricultural and financial conditions in America make it impossible for Louisville Joint Stock Land Bank to continue in business. Its ability to do so depended upon its ability to sell its bonds to the investing public. The government has refused to guarantee the payment of the bonds issued by Joint Stock Land Banks. Absent such guarantee, the investing public refuses to buy the bonds of the Louisville Joint Stock Land Bank. In those circumstances the Bank is itself a debtor, strenuously endeavoring to secure sufficint funds to pay its own obligations. Instead of being a creditor (speaking generically), it is a debtor in an amount, at least equal to the value of its assets.

The Bank, in liquidating its affairs, is desirous of converting its assets into cash as soon as possible without regard to the effect of such action upon even its own creditors. To that end it claims the right to foreclose mortgages so that, as advertised by it, foreclosed farms may be thrown upon the market at bargain prices and below their market value.

The justification of such conduct is sought in the "democratic principle" that the majority rule.

## POWER OF COURTS OF EQUITY.

We are told by counsel for the lienholder: "Moreover, courts of equity have long had the power to compel dissenting creditors to submit to a plan which the creditors in the majority accept as beneficial." Counsel for the respondent are advised of this doctrine, having argued the same as counsel for the purchaser in the litigation growing out of the sale of The Kansas City, Mexico & Orient Railway Company.

Trustees Corporation v. K. C., M. & O. Ry. Co., 18 Fed. (2d), 765, 26 Fed. (2d), 876; Consult, 28 Fed. (2d), 174, 176 (Walter H. Sanborn, Circuit Judge).

Prior to the enactment of Section 77, National Bankruptcy Law, and since, courts of equity in foreclosing a mortgage on the property of a corporation, permitted the bond holders, the general creditors and the stockholders in the old corporation to form a new corporation and thus retain the possession of the property of the old corporation. So zealously did the Court protect this right, that in the Boyd case (228 U. S. 482) a plan of reorganization which attempted to exclude the creditors of the old company from a share in the assets in the new company, was held fraudulent and therefore void. Such a result can only be predicated on the fact that the old and the new corporation are in effect one and the same corporation, the same debtor in a reorganized form, with the same bondholders, general creditors and stockholders.

In the carrying out of this doctrine, this Court in Kansas City Terminal Railway Company v. Central Union Trust Company of New York (271 U. S. 445), decided that it was not necessary in every case for the creditors of the old company to be paid in full before the

stockholders in the old company were given an interest in the new company. The doctrine of these cases has been written into the bankruptcy law upheld as valid in the Rock Island cases decided by this Court, April 1, 1935.

Radford is asking at the hands of this Court the same right to protect his interest in his farm that this Court has heretofore given to stockholders in a corporation to protect their interests in that corporation.

## GUNN v. BARRY.

Counsel for the petitioner cite Gunn v. Barry, 15 Wall. 610. This is the third appearance of this case in the pending litigation. Gunn v. Barry dealt with the action of a state which was held invalid because in conflict with the contract laws of the Federal Constitution. Counsel for petitioner (Pet. Brief, p. 26) had previously admitted "that Congress under the power to pass laws on the subject of bankruptcies, can impair the obligation of a contract."

In re Dillard, Fed. Cas. 3912, the bankrupt filed his petition to be adjudicated as such on March 26, 1872.

On March 3, 1873, Congress amended National Bankruptcy Law as it related to homesteads. The Court ruled: The bankrupt in this case * * * (was) adjudicated bankrupts prior to the passage of the Act of March 3, 1873. In our opinion, the relation of the bankrupt to his property is fixed the moment he files his petition in voluntary bankruptcy * * *. The rights of his creditors to his estate are determined at the same time."

Held, therefore, a state law thereafter passed did not affect the exemptions of the debtor.

In the face of such action on the part of Congress, a single creditor claims that such act is void, because, here-

tofore one creditor was only bound when two creditors so agreed, and thereafter in the absence of such agreement, a single creditor could be bound, hence deprived of his property without due process of law. "Due process of law" as thus defined, is reduced to the "due process" of the will of other creditors, who accordingly are to be deemed greater than Congress.

## LOAN ASS'N VERSUS TOPEKA, 20 WALL. 655.

In citing the case just mentioned, counsel say that the language in the case "provides an answer to the popular cry that Congress should

(a) "be able to adopt legislation in order to relieve debtors from their improvident obligations at the expense of their creditors, and

(b) "yet permit the debtors to retain the property which they have pledged for security for the thing borrowed."

It is interesting to note that a land bank, a creditor, refers to Radford, its debtor, as "improvident." What about the bank which loaned Radford $9,000 and is now in a state of liquidation because its bonds are not being purchased in the market at par?

As to debtors being improvident, Courts deal, in interpreting a law, with people as they are and not as they ought to be. Congress, however improvident a debtor had been, regarded his rehabilitation as a step in the program of economic recovery. If such a debtor had no assets, it may be argued that such a step was at the expense of his creditors. But such argument fails when we are reminded that a creditor loses nothing in the discharge of a debtor who is without assets. In fact he sometimes gains the privilege of a deductible loss in making up his income tax return.

As to (b): This contention of the counsel for the petitioners has been frequently analyzed in this brief.

The case now being considered is interesting in the use it makes of the word "robbery". In the brief filed in the District Court counsel for the petitioner said of the Frazier-Lemke Act (in italics) "This is not bankruptcy but robbery". When counsel were reminded that they were discussing an Act of Congress approved by the President, and thereby charging two branches of the government with "robbery", this statement in the form quoted was omitted in the brief filed in the Circuit Court of Appeals, nor in that form is it found in the brief filed in this court. In view of the citation of the case now being considered, we are not advised whether or not counsel are still believing that a robbery may be committed as a result of this proceeding nor just whom counsel charge with that crime.

## OCHOA v. HERNANDEZ, 230 U. S. 139.

This case cited by the counsel for the petitioner (Brief, p. 30) is a case arising under a state law. The case has no application to a law passed by Congress in the exercise of a power to establish a uniform law on the subject of bankruptcy.

## EXEMPTIONS.

Counsel for the lienholder claims that the Frazier-Lemke Act is void for the alleged reason that it makes a distinction between creditors who hold a lien on exempt property and creditors who hold a lien on not exempt property (Brief, p. 35). It is claimed that in case of encumbered exempt property, the exempt property is set

aside and passes out of the jurisdiction of the bankruptcy court, while the encumbered non-exempt property remains in the jurisdiction of the bankruptcy court and may be repurchased free of liens by the farmer under the Frazier-Lemke Act.

As applied to the facts in the proceeding at bar, it does not appear that Radford has any encumbered exempt property. Hence in the proceeding at bar, no discrimination is being practiced against the lienholder (Consult, The Fifth Amendment, *ante*, pp. ——).

But under the Frazier-Lemke Act, exempt property does not pass out of the jurisdiction of the court. Sec. 75, sub. (n) provides:

> "the filing of a petition pleading for relief under this section shall subject the farmer and his property wherever located, to the exclusive jurisdiction of the court."

Subdivision (o), section 75, refers to the protection of "the farmer or his property".

Paragraph 7 requires the court to "stay all proceedings for a period of five years".

It will thus be seen that in none of the provisions of the Act, has any distinction been made between exempt property and non-exempt property.

Under the general bankruptcy law, it is true that exempt property passes out of the jurisdiction of the court. This result occurs because if the property is exempt, there is nothing the court can do with the property under the bankruptcy law, except to set it aside. But having regard to the spirit and the intent of the Frazier-Lemke Act (for the spirit and the intent of an act always governs the interpretation thereof), the Court is concerned with enabling the farmer to purchase the exempt property, under paragraph 7 of the Act to the same extent and in

like manner as the purchase of non-exempt property. In fact, the primary purpose of the Frazier-Lemke Act is to protect farmers in the enjoyment of their homes. Many of these homes are exempt, to a greater or a lesser extent. To exclude exempt property from the operation of the Frazier-Lemke Act, would as a practical proposition, emasculate an act of Congress enacted in a humane spirit and designed to accomplish a beneficent purpose.

## DEFICIENCY JUDGMENT.

Counsel for the lienholder claims that the Frazier-Lemke Act is void because, it is alleged: "no provision is made for a deficiency claim by the mortgagee against the bankrupt estate" (Brief, p. 36).

The Frazier-Lemke Act is an amendment to Section 75, National Bankruptcy Law. Section 75 is especially declared to be a part of a new chapter added to National Bankruptcy Law, hence it is a part of the law in its entirety. Consult subdivision (n) Section 75.

Under Section 57 (h), National Bankruptcy Law, a secured creditor is allowed a general claim for the difference between the value of his security and the amount of his debt. So that the lienholder is allowed a deficiency claim against the estate of the bankrupt.

So far as *in re* Bradford, cited by counsel for lienholder is concerned: That case was reversed on appeal, 4 C. C. A., April 2, 1935.

When President Roosevelt, in approving the bill referred to deficiency judgments, he was not referring to claims allowed in favor of secured creditors for the unsecured portions of their debts against the estate of the bankrupt. He was referring to the entry of a deficiency judgment in a suit to foreclose a mortgage.

As to the "arbitrary destruction of a contract right" (Petitioner Brief, p. 36), we cite from the same document (p. 26) Congress "can impair the obligation of contracts —for such is the very essence of bankruptcy law" (186 U. S. 186).

As to "the intent of the authors of the Frazier-Lemke Act" (Brief, p. 37), they were concerned with the right of a debtor to be discharged of the obligation to pay his debts, a right upheld by this Court (186 U. S. 186), not with the question, should a lienholder be allowed a claim of a general nature against the estate of a debtor for the unsecured part of his claim.

It has been pointed out, one creditor may not complain under the Fifth Amendment of an injury to another (Consult, The Fifth Amendment, *ante*, pp. ——).

As to the alleged "confiscation" (Brief, p. 37):

(a) The Bank is clearly entitled to a general claim for the unsecured portion of its debt against the unsecured non-exempt assets of Radford (Sec. 57-h, 75-n).

(b) What is not so paid of such general claim is dischargeable in bankrutpcy (186 U. S. 186).

(c) No evidence is offered that the amount of the dividend which the bank may receive on its unsecured debt is so substantial as to be worthy of discussion. *De minimis non curat lex.*

Counsel for the lienholder entertain erroneous, at times peculiar, notions as to the deficiency which may remain unpaid if Radford should buy the farm.

At Brief, p. 36, reference is made to "a very nebulous possible right to participate with general creditors in such amount as is realized from unpledged (should have added, non-exempt) property". (Consult, National Bankruptcy Act, Sec. 57h; also see 75[n].)

Next we are told that if Radford buys the farm (Brief, p. 37), the Bank "will either have (1) *perhaps*, a deficiency claim * * * thereby *greatly* reducing the amount which can be paid to general creditors". We assume all this means that notwithstanding the clear language of the statute just cited (which, by the way, counsel do not cite), the right is thought to be "nebulous", while, in the absence of definite evidence to the contrary, the amount involved is said to be "great".

## "DISCRIMINATIONS."

Counsel for the petitioner (Brief, p. 38) have set up another man of straw, thrown out another smoke screen by claiming that there is a legislative discrimination between the relative rights of secured and unsecured creditors, in electing between paragraphs 3 and 7 of the Frazier-Lemke Act. The burden of this argument is that this alleged discrimination enures to the benefit of the secured creditor. A person benefited by the operation of an act cannot complain that someone else is thereby injured, and that hence the act is void. (Consult, The Fifth Amendment, *ante* p. —).

The contention of counsel that an unsecured creditor should have the right to say whether or not a secured creditor shall be governed by paragraph 3 or by paragraph 7 of the Frazier-Lemke Act, has potentialities within it of interest. Suppose the shoe was on the other foot. Suppose an unsecured creditor could decide what should be done with respect to the security of a secured creditor. In such a case, we imagine the secured creditor would claim, loud and long, that the unsecured creditor was aiding in depriving the secured creditor of his property without due process of law.

We now enter upon a very remarkable contention: "The possibility in many cases of a mortgagee or secured creditor being worse off than the unsecured creditor" (Brief, p. 37).

Here, again, we have a failure on the part of counsel to understand the function of this Court in passing on questions arising under the Fifth Amendment. In such cases, the Court deals with the facts of a particular case, not with the possibilities which may or may not arise in other cases. The rule is to decide such questions "as the matter shall require", so said Solomon of old (1 Kings, 8:59). And so has this Court recently reiterated.

Nashville, etc., Ry. Co. v. Walters, 79 L. Ed. 458, 461.

The argument now being analyzed has a fantastical basis. Counsel imagine that a farmer may have unpledged property worth $8,000 and at the same time own a farm mortgaged for $10,000. In those circumstances, it is further imagined that the farmer, instead of using his unpledged assets to take care of the mortgage, will risk going into bankruptcy and perhaps lose all his property. In nine months of concentrated intensive experience in the administration of the Frazier-Lemke Act, the counsel writing this brief has never heard of such a farmer.

This whole argument is a failure to understand Secs. 57(h), 75(n).

In the Rock Island cases decided by this Court, April 1, 1935, Section 2, clause 15, National Bankruptcy Act, was construed in *pari materia* with Section 77. By the same token, Sections 57(h) and 75(n) are to be construed as a part of the Frazier-Lemke Act.

In the instance hypothesized by counsel for the petitioner (Brief, p. 37), the problem would be solved in this way:

The mortgagee would receive $6,000 on a debt of $10,000, leaving unpaid $4,000. This $4,000 would then be allowed as a general claim. In this way, the amount of the general claims would be increased to $14,000. Dividing the unpledged general assets ($8,000), among claims of general nature amounting to $14,000, we would have a dividend of 57 per cent. on the general claims. So the mortgagee would receive $6,000 as a preferred creditor, plus $2,280 (57 per cent. of $4,000) on its unsecured unpaid balance, a total of $8,280, or 82.8 per cent. of its claim. Unsecured creditors in turn would receive a dividend of 57 per cent.

If it be true, as contended by counsel for the petitioner, (Brief, p. 38), "the mortgagee is penalized 10 per cent. for having taken security", the remedy is at hand, release the security.

In the case of Becker v. Gill, 206 Fed. 36, a curious situation arose. An unreported conditional sale was held in the District Court to be invalid as a security against creditors who extended credit between the date of the execution and the recording of the instrument. The amount of these debts was greater than the value of the security. In this way the entire security was held invalid. The District Court, however, went further and wiped out the debt of the formally secured creditor by deciding that all of the intermediate creditors were entitled to be paid in full before the alleged secured creditor was entitled to be paid anything on his general claim. On appeal, the District Court was reversed. A majority of the Court held that if the security was declared invalid, the general claim remaining was on a parity with other general claims. He who has loved and lost is better than he who has never loved at all. In such instances, his sense of loss is not aggravated by the imposition of a penalty. So a secured creditor, who once secured is there-

after freed of such an incident, is not by reason of his former secured condition and of the loss which he has sustained, further penalized; certainly not in a court of equity.

In Morrison v. Rieman, 249 Fed. 97, a judgment creditor filed a petition in bankruptcy against a debtor. It was claimed that being a secured creditor, in that he had a judgment lien against all of the realty of the debtor he could not file a petition in involuntary bankruptcy (Consul Nat. Bank. Act, Sec. 59b). The petitioning creditor released his judgment lien and was allowed to become a general creditor (pp. 101-103).

The practice of waiving securities in order to be eligible to file an involuntary petition or to vote for a trustee, is very generally recognized.

2 Remington on Bankruptcy (3d Ed.), p. 327, Sec. 934.

## LAND BANK, A FEDERAL AGENCY.

Counsel for the petitioner, who object strenuously to any classification in favor of a farmer, protest loudly that the Land Bank is a Federal Agency, and on that account claim especial consideration for it as a creditor. No distinction of that kind is found in the Act. When a Federal Corporation becomes a creditor, it is placed on the same basis in a proceeding in bankruptcy as any other creditor.

14 Federal Digest (West Pub. Co.), p. 16015, Sec. 52½;

Sloan Shipyards v. U. S. Fleet Corporation, 258 U. S. 549, 570.

As to the bonds issued by the Land Bank being "a lawful investment for all fiduciary and trust funds", there is no evidence that any of the bonds of the Louisville Joint Stock Land Bank are so held.

But inasmuch as debts of a fiduciary character are dischargable in bankruptcy (Hennequin v. Clews, 111 U. S. 676; 7 Remington on Bankruptcy, 4th Ed., p. 811, Sec. 3589), it is difficult to see why Radford who executed a note to a land bank in a transaction non-fiduciary in character should be denied relief in this proceeding, just because the land bank issued its bonds, pledged Radford's notes as security for its bonds and then sold its bonds to fiduciaries.

Under Sec. 676, Title 12, Ch. 7, Banks and Banking, United States Code Annotated, a land bank "may sue and be sued * * * as fully as natural persons".

As to whether or not investors would ever have purchased the securities issued by the land bank if the Frazier-Lemke Act had been in effect when such securities were issued, we have no means of knowing. We do know that for some time prior to June 28, 1934, Louisville Joint Stock Land Bank was not selling its securities, was liquidating its affairs and was offering to buy its own securities at fifty-five cents on the dollar. We may also admit that if investors could have foreseen the economic conditions which gave rise to the Frazier-Lemke Act, the land banks would never have sold any securities at all.

## STATE'S RIGHTS.

Counsel for petitioner claim that the Frazier-Lemke Act ousts "the creditor of all of the rights given under the mortgage, and under the laws of the state where the property is located".

The obligation of the mortgage contract may be impaired by Congress in the establishment of a Uniform Law on the subject of bankruptcy (186 U. S. 186). The bankruptcy law is as much the law of each state as it is a law of the United States.

Conner v. Long, 104 U. S. 228.

The bankruptcy law is supreme.

Globe Bank & T. Co. v. Martin, 236 U. S. 288;
*Re* Watts, 190 U. S. 1;
*Ex parte* Baldwin, 291 U. S. 551;
Moore v. Bay, 284 U. S. 4;
Int. Shoe Co. v. Pinkus, 278 U. S. 261.

Judge Chesnut's opinion has been reversed on appeal (4 C. C. A., April 2, 1935).

## INTEREST.

Complaint is made (Pet. Brief, p. 36): "Interest on the mortgage debt is wiped out".

That is, a debtor who pays rental value is also, according to leanholder, expected to pay interest value. When times were normal, Radford paid interest, but not also rent. He was an owner then and owners do not pay rent. By the adjudication in bankruptcy, Radford became a tenant. As a tenant, he pays rent. A tenant is not expected to pay both rent and interest.

As to the alleged "neglible amount" which may be realized from the rental, that is not the fault of Radford. That amount is based on the testimony of Radford as to the productive value of the farm. Radford is not responsible for the taxes or the insurance. Tenants are usually not so concerned.

## THE MORATORIUM.

Complaint is made of the "rigid fixation" of the term of the moratorium authorized by the Frazier-Lemke Act, "by legislative fiat" (Pet. Brief, p. 40).

Under the doctrine recognized in the Minnesota Mortgage Moratorium Case, 290 U. S. 398, the moratorium

authorized by the Frazier-Lemke Act ceases when the Court decides, the reason for it has ceased.

And it is not accurate to claim that "the creditor cannot for five years take any step, either in a State or Federal Court:

(a) "to enforce his mortgage lien; or

(b) "collect the rents and profits * * * or

(c) "otherwise to obtain any equitable relief whatever" (Brief, p. 40).

The creditor may enforce his mortgage lien if the debtor fails to pay the rent.

The creditor may collect the rents and profits by an order of the Court directing the trustee in bankruptcy to collect them and pay them to the lienholders.

## THE RENTAL.

Counsel complain (Brief, p. 42) that the rental to be paid by the debtor is "to be distributed between the secured and unsecured creditors, as their interests may appear".

How else could the rental be distributed? But in the case at bar, the rental does not amount to the interest on the mortgage debt. Hence, the petitioner would get all the net proceeds of the rental, and no question of distribution can arise.

It is true that the "first payment of rent does not have to be paid for six months."

In other words, this Court is expected to rule that a law which by way of exemption gives a six months' credit of $162.50 to a debtor who has lost an equity of $9,000 in a farm, as against a creditor who has profited over $800

by reason of its dealings with such debtor, is so unreasonable and arbitrary as to violate the Fifth Amendment.

*Res ipso loquitur.*

But the first six months of the moratorium are not "without compensation". When paid, at the end of six months, the rental is for the six months which have expired and for the ensuing six months.

As to the crops: The mortgage of the lienholder continues to be a mortgage on the crops until Radford buys the farm (Consult paragraph 2, Frezier-Lemke Act).

As to "intangibles":

(a) The lienholder in this case has no lien on intangibles.

(b) The debtor is not at this time seeking to purchase or retain any intangibles.

(c) The debtor does not own any "stocks, bonds, savings accounts (or) insurance policies".

(d) If he did own such last described intangibles, then the act properly construed would not apply to them. Such intangibles have nothing to do with operating the farm.

(e) A debtor could not in any event retain intangibles without paying a rental therefor. Certainly no court would ever rule a debtor by paying rent on a farm, could keep a lot of intangibles of value, without paying a rental therefor.

As to the contention of counsel for petitioner (Brief, p. 43):

(a) "No provision is made for the payment of taxes, insurance or repairs,

(b) "in contrast to the express requirements of the earlier portion of the Act."

Under the "earlier portion of the Act" (Sec. 3), Radford would have paid $45.50 rent the first year, plus the taxes, but not insurance or repairs. The lienholder objected to these "earlier portions" of the Act. Thereupon Radford's rent was increased to $325, but no taxes, insurance or repairs are to be paid by Radford. Radford is now a tenant of his former farm. Tenants who pay rent do not usually pay taxes, interest, insurance or repairs.

As to "no assurance that the mortgagee would receive a dollar during the five years"; in case the mortgagee owned the farm, this assurance would still be lacking. The rental will either be paid by Radford or he will lose the farm. He is not responsible for the limited income of the farm. $220 less 7% for costs of administration on $325, or $22.75, leaves $197.25. If the bank spends that much in the upkeep of the farm, that again is not the fault of Radford. If the bank owned the farm, the upkeep charge would not be any less than if Radford stayed on the farm.

## RE-APPRAISAL.

Counsel for the petitioner contends (Brief, p. 38): "only encumbered real estate is subject to the reappraisement provisions, and then only upon the request of the lienholder".

In making this contention, counsel have omitted advising this Court that Judge Dawson ruled to the contrary (Rec., p. 63). The question was not discussed in the Circuit Court of Appeals. Judge Dawson decided that the trustee in bankruptcy, by virtue of paragraph 2 of the Frazier-Lemke Act, became a lienholder on all the property of the debtor and hence was entitled to the reappraisal provisions of paragraph 7.

Paragraph 7 provides: "that upon request of any lienholder on real estate, the Court shall cause a reappraisal * * *".

Thus far it is clear that Louisville Joint Stock Land Bank, as a lienholder on the property of Radford, is entitled to a reappraisal. The question mooted by counsel is the proposition, to what does the reappraisal extend? Counsel invoke a rule of construction, "a reappraisal of such real estate" implies the last antecedent, hence "such real estate" means the real estate on which the lienholder has a lien. Courts in interpreting statutes have regard to the spirit and intent of the law and are not limited, but merely aided, by rules of grammatical construction. Legislative draftsmen are not always grammarians.

Taking up the Frazier-Lemke Act, we find that at the outset it is required, that all of the property of the debtor "whether pledged, encumbered or unencumbered by liens or otherwise, be appraised".

In paragraph 2 "a general lien" is imposed on the property of the debtor in favor of the trustee.

Paragraph 7 provides: "At the end of five years, or prior thereto, the debtor may pay into court the appraised price of the property of which he retains possession; provided that upon request of any lienholder on real estate, the Court shall cause a reappraisal of such real estate".

It is respectfully submitted, to effectuate the purpose and intent of the Act, the Court should construe the words "such real estate" to be the real estate of which the debtor "retains possession".

## THE OIL WELL.

Here we meet with an old friend, Radford's supposititious oil well. This oil well has had a checkered career (Brief, p. 39). It seems that Radford owns an undivided

one-half interest in one-half acre of land appraised at $150 (Rec., p. 87). So far as we know, there are no oil wells in Kentucky. But counsel for the petitioner are counsel for an oil company and doubtless know more about oil wells in Kentucky than we do. At any rate the oil well has not yet been discovered. The theory of counsel is that at some time within the next five years, oil may be discovered on this one-half acre of ground; that Radford may then elect, to buy the one-half acre of ground for $150; that because Louisville Joint Stock Land Bank does not have a mortgage on this one-half acre of ground, creditors could not demand a reappraisement thereof; hence that Radford could buy this unencumbered tract of land for $150, the amount of the original appraisement and (as was feared by the lienholder in the brief filed in the Circuit Court of Appeals, Radford might achieve a "handsome fortune", even to the extent of becoming a millionaire), while the Land Bank was vainly struggling to save its stockholders from a double liability by endeavoring to sell Radford's unencumbered property for that enhanced value which counsel for the lienholder sometimes prophecy and sometimes view with trepidation.

So because Radford may some day own an oil well, which has not yet been discovered, counsel argue that in the present tense, he may not save the roof over his head but instead become a recipient of public relief.

The true answer to all the contention about the oil well is that, if, as and when, this oil well is discovered, and Radford tries to buy a one-half interest in it for $150, the Court will properly decide that such a result is so unreasonable as to be in violation of the Fifth Amendment, and hence as to that particular result (if it be claimed that such a result is absolutely predestined, which counsel for Radford deny) the Frazier-Lemke Act may be held invalid.

An act of Congress may be in violation of the Fifth Amendment in some circumstances and not in others.

Nashville, etc., R. R. Co. v. Walters (recently decided by this Court).

Counsel for petitioner claim (Brief, p. 39):

> "There is no provision for a reappraisal of personal property pledged or unpledged."

What counsel really mean is that a lienholder on real estate only may not ask a reappraisal of personalty, not because such property is personalty, but because the lienholder has no lien on the personalty. But just as a trustee in bankruptcy is a lienholder as to all the realty owned by the debtor, so he is a lienholder as to all the personalty owned by the debtor; hence, may demand a reappraisal thereof.

Radford's personalty is not of a character likely to appreciate in value (Rec., pp. 87, 88). Certainly if personalty of a character which has substantially appreciated in value is sought to be reacquired by a debtor, and such debtor should claim he is entitled to so reacquire that personalty without reappraisement, and also claim that the trustee in bankruptcy is not a lienholder entitled to a reappraisement of all assets, the Court would properly rule that such a construction would make the law so unreasonable as to be invalid as to the right of a debtor to reacquire such personalty.

But why should Radford:

(a) Who is not seeking at present to acquire personalty; and

(b) Who admits that the trustee in bankruptcy, as a lienholder, is entitled to a reappraisement of personalty;

lose his farm because of possible changed circumstances in other cases not before the Court?

It must be remembered that "it is a Constitution" which the Court is expounding in this proceeding, an instrument dealing in generalities and not in particulars, an instrument which, in the very nature of things, cannot be expected to be reflected in legislation manifesting perfection, nor in legislation devoid of all conjectural possibilities (290 U. S. 443; 219 U. S. 67; 211 U. S. 450).

## RETROACTIVE EFFECT OF FRAZIER-LEMKE ACT.

Complaint is made by the petitioner (Brief, p. 34) that Frazier-Lemke Act is retroactive only in that it applies "only to debts existing at the time this Act becomes effective", that is, June 28, 1934.

So far as Radford is concerned, his petition was filed before June 28, 1934. It does not appear that he has any creditors who became such after June 28, 1934, nor is there any intimation that any discrimination is being made in this proceeding between creditors who existed before June 28, 1934, or who existed after that date, for no creditors after that date are in existence.

Heretofore, the right of Congress to discriminate as between creditors existing prior to taking effect of an act and creditors thereafter coming into existence after the taking effect of the act, has been recognized.

Holt v. Henley, 232 U. S. 637.

Why is not the converse true?

Counsel reiterates its complaint, there is "no justifiable basis" for the distinction made in the act between

debts existing at the date of the act and debts thereafter incurred.

The basis for this distinction is that Congress was dealing with a condition, not a theory. The value of farm lands had decreased prior to June 28, 1934. It was not expected that any loans on farms would thereafter be made except upon a rising market.

Hence, there was no necessity for devaluing farm values below their value on June 28, 1934, or attempting to scale a debt incurred after that date.

Congress may classify the objects of legislation (186 U. S. 186; 95 Fed. 637, 647, 648; 7 Corpus Juris, p. 19, Sec. 9).

Counsel again invade the realm of the unreal. They imagine a farmer may have two mortgages, one executed prior to June 28, 1934, and one executed after that date (Radford's mortgages were executed, one in 1922 and one in 1924. Hence, the question mooted does not arise in this case).

But counsel imagine that if a farmer has two mortgages outstanding, one prior to June 28, 1934, and one after June 28, 1934, and he repurchases his farm under the Frazier-Lemke Act, the second mortgage has become a first mortgage. If this were so, how could the holder of the first mortgage, who has received all that is due him under the law, complain of that result?

But when a debtor is adjudicated a bankrupt, the title to all of his property passes to the trustee in bankruptcy (National Bankruptcy Law, Sec. 70). When the farmer buys the farm from the trustee, he is not redeeming from or discharging a mortgage; he is acquiring a new title to his property, free and clear of liens.

Just what the rights of a second mortgagee, whose security was given after June 29, 1934, would be is not

now present for decision. The question mooted is not involved in this proceeding.

It is probable, a second mortgagee whose rights accrued after June 28, 1934, might be entitled to have the security sold, subject to a first lien in favor of the mortgagee for the amount expended by him in re-acquiring the title to the security. As to the "complex discriminations" which may arise in other cases (Pet. Brief, p. 44), why should Radford lose his farm on that account?

For example, in Beeker v. Gill, 206 Fed. 36, a conditional sale was held void as to creditors whose claims arose intermediate the execution and the recording of the instrument.

See also—

Blake v. Meadows, 225 Mo. 1.

Suppose a debtor (Radford is not one of these) has two sets of creditors, one after June 28, 1934, and one before June 28, 1934, the creditors after June 28, 1934, are entitled to have the property of the debtor sold as if the Frazier-Lemke Act had not been enacted. If it is not possible in such circumstances to administer the property with due regard to each set of creditors, then the rights of creditors subsequent to June 28, 1934, being superior to creditors whose claims arose before said date, the property must be administered accordingly.

## EQUAL PROTECTION OF THE LAW.

We are next told: "There can be no doubt that the denial of the equal protection of the laws constitutes lack of due process" (Brief, p. 46, note). We assume this statement is made with respect to an Act of Congress.

The equal protection of the laws is enjoined by the Fourteenth Amendment (U. S. Code, Ann., p. 285). This constitutional provision applies to the states and has

never been applied to an Act of Congress. Otherwise, how could a land bank claim immunity from income taxation?

The rule as to the equal protection of the laws "does not however forbid classification * * * provided, always, that the classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."

Louisville Gas Co. v. Coleman, 277 U. S. 32, 37.

HEINER v. DONNAN, 285 U. S. 312.

This case is not controlled by any period of time. The controlling question was the right of Congress to enact a conclusive presumption that a gift was made in contemplation of death. The period of time was merely incidental to the main question involved. The Court in Heiner v. Donnan, said of the Schlesinger case: "The length of time was not a factor in the case." The law condemned in the Heiner case would be likewise vulnerable if made applicable without regard to a period of time.

Truax v. Carrigan, 257 U. S. 312, 332, cited by counsel for petitioners (Brief, p. 46), arose under the Fourteenth Amendment and presented a question of State, not Federal law.

Schlesinger v. Wisconsin, 270 U. S. 230, 240, is based on the statement: "There is no adequate basis for this distinction".

Bronson v. Kenzie, 1 How. 311, arose under the contract clause of the Constitution which as to private contracts, does not limit Congressional action.

186 U. S. 186.

The Gold Cases.

See, also, 290 U. S. 431, 432, 433, 465, 466, 467, 474, 481.

## JUDICIAL DISCRETION.

Under the Minnesota Mortgage Moratorium Case, 290 U. S. 398, 442, the length of the stay need not be five years. The Court may end the stay at any time its continuance appears to be arbitrary and unreasonable.

There is no requirement in the Act that "the debtor must be discharged upon the payment of the appraised value of the property". The language of the Act (paragraph 7) is that "the debtor may apply for his discharge."

The bankrupt under paragraph 2 is required to agree to buy his farm, if he so elects. He thus becomes individually responsible for the payment of the purchase price as fixed by the Court. This responsibility may be enforced in any manner incident to the enforcement of such agreements.

As to "abandoning his property," no judicial power can build a wall around a farm and prevent its abandonment. If by "abandonment" is meant a breach of the contract to purchase, all the known remedies of the law are available to enforce such contract.

We are told: "The only discretion left to the Court is to confirm the value fixed by the appraisers and to approve a 'reasonable' rental for the land of which the debtor retains possession" (Brief, p. 49).

The report of the appraisers is merely advisory. Else, where did the lienholder obtain a right to attempt to fix such value by a meaningless gesture to buy land and pay for it in worthless paper?

The supervisory power of the Court with respect to the report of a referee is very broad (53 Corpus Juris, p. 785, Sec. 264), "* * * the acceptance or rejection of the report may be matter of discretion" (*Ibid*, p. 786, Sec. 266).

The ascertainment of compensation for property taken by the government is a judicial function (262 U. S. 341, 343, 344).

Hence the ascertainment of the value of Radford's farm is a judicial function. Both the referee in bankruptcy and the District Judge so regarded in the case at bar. Lienholder filed no written objections to the report of the appraisers. Lienholder introduced no evidence of the value of the farm, though afforded an opportunity to do so. Counsel for Radford gave and is still willing to give the lienholder every conceivable opportunity to prove the value of the farm, if such opportunity be requested.

As to the rental value of the farm not taking "into consideration any other assets which the farmer happens to own"; how can the existence of these "other assets" affect the value of the farm?

We are next referred to the alleged "inflexible denial to the creditor of any remedy in a Federal or State Court for five years * * *" (Brief, p. 50):

(a) The five years' period, as already stated ends when the Court so decrees.

(b) If the farmer fails to pay the rent as fixed by the Court, the lienholder may foreclose the mortgage.

## EMERGENCY.

Counsel (Brief, p. 51) analyze the Minnesota statute upheld in the Blaisdell case. That statute, passed by Minnesota according to counsel:

(a) Did not impair the integrity of the mortgage indebtedness (Congress is not so limited);

(b) The obligation for interest remained (It remains under the Frazier-Lemke Act unless the debtor is granted

a discharge. In that event it shares the fate of other indebtedness of the farmer);

(c) The right of a mortgagee-purchaser to title in fee was not affected (If redemption be had under the Minnesota statute, the title revested in the mortgagee):

(d) The right to a deficiency judgment failing redemption remained (Such a right is dischargeable in bankruptcy);

(e) The rental was devoted to the required payments of taxes, insurance and interest on the mortgage indebtedness. (The mortgagee in the instant proceeding receives the proceeds of the rental and may devote them to any purpose it sees fit);

(f) As to the temporary nature of the relief granted by the Frazier-Lemke Act, consult 290 U. S. 442.

As to the failure of Frazier-Lemke Act to declare an existing emergency:

(a) Such declaration, if made, would not have been binding on the Court (290 U. S. 398, 442);

(b) The exercise of a power is referable to the authority thereof (49 Corpus Juris, p. 1289, Sec. 123).

That is, when a legislative body exercises a power justified by the existence of an emergency, such exercise is regarded as the execution of such power.

As to the contention "* * * no power is vested in any Court to determine whether the emergency was passed"; the power just mentioned is constitutional in its origin (290 U. S. 442).

At one point in their brief counsel for petitioner contend:

(a) A federal moratorium is void; because unreasonable in that:

(b) 29 States (not including Kentucky, in which Radford's land is situate) have passed moratorium acts.

To which we say:

The constitutional power of Congress to establish a uniform law on the subject of bankruptcies is not limited by the extent of state action on the same subject (Consult State's Rights, *ante*, p. —).

The 29 moratoriums constitute evidence of the necessity for their enactment.

## CONCLUSION.

Under Sections 77 and 77B, corporations remain in possession of their property not by the payment of cash, but through the issuance of securities in altered form in reduced amounts.

Under Section 75, a farmer remains in possession of his property by the payment of cash.

How can it be, the former valid, and not the latter?

EDWIN A. KRAUTHOFF,
*Attorney for Respondent.*

Room 1010,
140 South Dearborn Street,
Chicago.